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DICKINSON WRIGHT'S

TENNESSEE INSURANCE LEGALNEWS

TENNESSEE ATTORNEY GENERAL HOLDS THAT TENNESSEE STATUTE PROHIBITING PREFERENCES OR DISTINCTIONS IN CERTAIN INSURANCE TRANSACTIONS IS NOT UNCONSTITUTIONAL

by John E. Anderson, Sr., who is a member in Dickinson Wright's Nashville office, and can be reached at 615.620.1735 or janderson@dickinsonwright.com

In its April 24, 2013 opinion, the Tennessee Attorney General opined that the Tennessee Unfair Competition and Unfair or Deceptive Practices Act, which prohibits preferences or distinctions in certain insurance transactions, is not unconstitutional. The statute at issue, Tenn. Code Ann. § 56-8-104(18)(A), provides as follows:

> (18) Preferences or Distinctions in Certain Insurance Transactions prohibited.
>
> (A) Making, offering to make, or permitting any preference or distinction in property, marine, casualty, or surety insurance as to form or policy, certificate, premium, rate, benefits, or conditions of insurance, based upon membership, nonmembership, or employment of any person or persons by or in any particular group, association, corporation, or organization, or making the preference or distinction available in any event based upon any fictitious grouping of persons . . . .

The opinion explained that this statute essentially prohibited insurance companies from offering discounts to certain groups of people based upon their membership and/or employment by a particular organization or company. "This type of anti-discrimination restriction is designed to prevent insurance companies from offering discounts or other preferences 'to persons, or groups of persons, based upon factors other than legitimate rate-making considerations.'" These provisions prevent "unfair discrimination among similarly-situated purchasers of insurance."

The Attorney General concluded that the anti-discrimination restriction in Tenn. Code Ann. § 56-8-104(18)(A) does not violate the commercial speech protections of either the First Amendment of the United States Constitution or Article I, Section 19 of the Tennessee Constitution. "Both of these constitutional guarantees provide a qualified protection for commercial speech."

Additionally, the Attorney General noted that by enacting Tenn. Code Ann. § 56-8-104(18), the General Assembly effectively has prohibited insurance companies' preferences in premiums, rates, benefits, or other conditions of insurance based upon group membership or

employment. It noted that this provision is consistent with other provisions of the Act, which prohibit insurance companies from granting preferences based upon factors other than risk, citing Tenn. Code Ann. § 56-8-104(7)(A)-(E), and, conversely, which prohibit insurance companies from giving less favorable terms based upon other impermissible factors, such as race, sex, national origin, and disability, Tenn. Code Ann. § 56-8-104(7)(F) & (G).

"The General Assembly has thus deemed harmful to the public the commercial activity of granting insurance rate reductions or other preferences based upon group association rather than risk factors, and it has banned such activity in keeping with other anti-discrimination provisions that prohibit granting preferences or offering less favorable terms based upon impermissible considerations."

The opinion noted the significant difference which existed between regulating the practice of offering rebates and prohibiting the practice of offering reduced rates or other preferences based upon group affiliation. A prior Attorney General opinion concluded that a total ban on rebates would be an unconstitutional restraint on commercial speech.

Finally, the opinion recognized that the Act sets forth exceptions to the anti-discrimination provisions of Tenn. Code Ann. § 56-8-104(18). Among others, the Act contains an exception for "any domestic company that confines its insurance business and operations to this state and to the provision of insurance solely for the benefit of its members, or members of its parent or sponsoring organization." Tenn. Code Ann. § 56-8-104(18)(B). Companies that fit within this exception require their customers to be members of the company or the company's parent or sponsoring organization. Membership is not in any way exclusive but, in fact, is open to any person who wishes to purchase insurance. Further, all members are offered rates on the same basis, adjusted for the legitimate individual risk characteristics. This business model, therefore, does not result in unfair discrimination among similarly-situated purchasers of insurance, nor does it create preferences that are based upon factors other than legitimate rate-making considerations, since both domestic and foreign companies that operate under this model by their very nature would not be engaged in this sort of discrimination.

Application of the foregoing exception does not raise significant equal protection concerns. "Rather than creating a true exception to Tenn. Code Ann. § 56-8-104(18), subsection (18)(B) appears merely to state the obvious." Therefore, a domestic or foreign company that provides insurance "solely for the benefit of its [own] members, or members of its parent or sponsoring organization" does not violate Tenn. Code Ann. § 56-8-104(18).

LOSS OF VALUE ≠ "LOSS OF USE"

by Autumn L. Gentry, who is a member in Dickinson Wright's Nashville office, and can be reached at 615.620.1755 or agentry@dickinsonwright.com

In *Tennessee Farmers Mut. Ins. Co. v. Reed, No.* E2012-01392-COA-R3-CV, 2013 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 10, 2013), the Tennessee Court of Appeals recently held that the plain meaning of "loss of use" does not include loss of value or economic loss.

In *Reed*, several defendants filed suit against Reed, the personal representative of the Estate of Carol LaRue, a financial and investment consultant. The defendants claimed that LaRue was negligent and had breached her fiduciary duty by advising defendants to invest in promissory notes which ultimately became worthless. As a result, defendants claimed that they had suffered financial damages.

Before her death, LaRue had purchased from Tennessee Farmers a commercial general liability insurance policy (the "policy"). The policy covered loss to personal property which it defined as follows:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that cause it.

Tennessee Farmers filed a declaratory judgment seeking a determination that defendants' claims were not covered by the policy. The trial court granted Tennessee Farmers summary judgment, finding that as a matter of law, the losses sustained by defendants were not "property damage" as defined by the policy, but instead were investments which lost value. The court further found that defendants' loss was the type that would typically be covered by an errors and omissions policy rather than a commercial general liability policy.

The court of appeals agreed that coverage did not exist for defendants' claims. While the policy did not define "loss of use," using the "usual, natural and ordinary meaning" of the words, the appellate court held that defendants were not alleging loss of use of the promissory notes. Rather, defendants were alleging that they had lost their investment. As a result, defendants were claiming a loss of value, not a loss of use. While the defendants attempted to equate the loss of use with loss of investment or value, the court of appeals held they are simply not the same.

MIND VERSUS BODY: DOES "BODILY INJURY" ENCOMPASS PURELY EMOTIONAL OR MENTAL HARM?

by Kelly M. Telfeyan, who is an associate in Dickinson Wright's Nashville office, and can be reached at 615.620.1721 or ktelfeyan@dickinsonwright.com

In *Garrison v. Bickford*, 377 S.W.3d 659 (Tenn. 2012), the Tennessee Supreme Court was called upon to determine whether emotional distress, standing alone, falls within the ambit of "bodily injury" as that term was used not only in the uninsured motorist policy at issue in the case, but is also used in Tennessee's uninsured motorist statute.
In *Garrison*, a car driven by Andy Bickford struck and killed Michael Garrison. Michael Garrison's parents, Jerry and Martha Garrison, and younger brother, Daniel Garrison, heard, but did not see, the collision. They did, however, respond to the accident in an attempt to render aid. Following Michael's death, the Garrisons filed claims for wrongful death and negligent infliction of emotional distress against Andy Bickford and the owner of the car, Rita Bickford. According to the complaint, the Garrisons "suffered grief, fright, shock, depression, loss of sleep and other problems" as a result of what they saw.

In addition to filing suit against the Bickfords, the Garrisons served a copy of the complaint upon their own insurance company, State Farm Mutual Automobile Insurance Company ("State Farm"), pursuant to the uninsured motorist provision of their policy. The Garrisons' policy with State Farm covered "damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle." The policy defined "bodily injury" as "bodily injury to a person and sickness, disease, or death that results from it."

As the litigation progressed, the Garrisons settled their claims against Andy Bickford. The Garrisons also settled their wrongful death claim with State Farm. However, State Farm refused to pay damages for the Garrisons' emotional distress claims on the basis that emotional harm did not fall within the policy's definition of "bodily injury."

After the trial court found in favor of coverage, State Farm appealed to the Tennessee Court of Appeals, who reversed the trial court's decision. On appeal to the Tennessee Supreme Court, the Garrisons argued that the policy's definition of "bodily injury" was broad enough to encompass emotional harm and, even if it was not, the uninsured motorist statute, Tenn. Code Ann. § 56-7-1201(a), was broad enough to include emotional injuries, thereby superseding the policy's the more restrictive language. In response, State Farm maintained that the Garrisons' mental injuries did not constitute "bodily injury."

In evaluating the parties' respective positions, the Supreme Court started by reviewing the relevant portion of Tennessee's uninsured motorist statute, which states:

> Every automobile liability insurance policy . . . shall include uninsured motorist coverage . . . for the protection of persons insured under the policy who are legally entitled to recover compensatory damages from owners or operators of uninsured motor vehicles *because of bodily injury, sickness or disease, including death, resulting from injury, sickness or disease*.

Tenn. Code Ann. § 56-7-1201(a) (emphasis added).

Noting that the uninsured motorist coverage statute's meaning of "bodily injury" was an issue of first impression in Tennessee, the Supreme Court decided to look to the decisions of other jurisdictions that had been called upon to evaluate the meaning of "bodily injury" in various contexts. The Supreme Court ultimately adopted the majority view, concluding that the term "bodily injury," as used in both Tenn. Code Ann. § 56-7-1201(a) and in the Garrisons' policy of insurance, did not include damages for a mental or emotional injury by itself. In support of its decision, the Supreme Court noted that the words "bodily injury to a person and sickness, disease, or death that results from it" (as used in the policy) and the words "bodily injury, sickness, or disease, including death" (as used in Tenn. Code Ann. § 56-7-1201(a)) are unambiguous and, when used to define "bodily injury," refer to physical, not emotional, conditions of the body. More specifically, the Tennessee Supreme Court held:

> In sum, a bystander claim for negligent infliction of emotional distress, such as that asserted by the Garrisons, is not a claim for bodily harm. . . .*Thus, we hold that, as applied to this case, "bodily injury" does not include damages for emotional harm alone.* We further conclude that the definition of "bodily injury" in the policy does not conflict with the uninsured motorist statute, section 56-7-1201(a). Consequently, we reject the Garrisons' argument that the statute supersedes the policy language.

Garrison, 377 S.W.3d at 671.

In holding that the term "bodily injury," as used both in the policy at issue and the Tennessee uninsured motorist statute, does not include damages for emotional harm alone, the Tennessee Supreme Court held that the policy did not cover the Garrisons' emotional distress claims. Accordingly, the Garrisons' emotional distress claims against State Farm were dismissed.

While the ruling in *Garrison* certainly favors insurers, the case does highlight a potential area of weakness in insurance policies. For this reason, it may be advisable for insurers to consider whether it might be a better practice to include language in their policies expressly stating that the term "bodily injury" does not include damages for "emotional harm" standing alone.

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